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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

NO. 71-1071

SAMUEL SAIKEN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an affidavit reciting detailed information regarding a buried human body, which information was obtained from a named, non-professional informant, establishes probable cause for issuance of a search warrant.

STATEMENT OF THE CASE

Samuel Saiken, petitioner, was indicted in the Circuit Court of Cook County on March 10, 1969 for the crimes of murder and conspiracy to obstruct justice. Joel Saiken, petitioner's son, informed the Indiana State Police that a body was buried behind the goose house on his father's farm. Pursuant to receiving this information, the police obtained a search warrant on February 19, 1969. The affidavit for the warrant read as follows:

State of Indiana
County of Porter ss:

Before the Hon. Harry Estler, Justice of the Peace

In the matter of a search for a dead human body believed to have been illegally procured.

Docket 25, Page 420, Cause No. 10-229

HARRY YOUNG swears that by virtue of information voluntarily conveyed to him by one JOEL SAIKIN on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:

> The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less,

said real estate being the property of Sam D. and Minnie Saikin, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.

Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified at Burns Indiana Statutes 9-607, that the Honorable Judge of this Court, taking with him such constables and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said judge.

Further affiant sayeth not.

HARRY YOUNG,
Harry Young, Affiant

Subscribed and sworn to before me, on this 19th day of February, 1969.

HARRY W. ESTLER,
Justice of the Peace.

My Commission expires 12-31-71.

In addition to the recitation in the affidavit, the police were told by Joel Saiken of the details surrounding the November, 1967 murder and burial of the victim, including the fact that Joel Saiken personally buried the body at his father's direction.

The Justice of the Peace accompanied the State Police to the farm. Because of the frozen condition of the ground, the excavation was halted. Digging was resumed the following day with the body being found after a single L-shaped hole had been dug.

Petitioner's motion to suppress evidence was denied by the trial court, which held that (1) the precision of the information from an identified source "who obviously appeared to know" would support entry without a warrant, and (2) the search was of an unused field and therefore outside the scope of Fourth Amendment protection. While the petitioner was acquitted of murder, the jury found him guilty of conspiring to obstruct justice. The Supreme Court of Illinois affirmed the conviction on October 4, 1971, finding that Joel Saiken personally viewed the facts asserted in the affidavit and that the assertions constituted a criminal admission which lent credence to the statement.

ARGUMENT

I.

THE AFFIDAVIT CONTAINED A SUBSTANTIAL BASIS FOR INDEPENDENT JUDICIAL EVALUATION OF PROBABLE CAUSE.

Only probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Beck* v. *Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 228 (1964). Hearsay may be the basis for the issuance of a warrant so long as there is a substantial basis for crediting the hearsay. *Jones* v. *United States*, 362 U.S. 257, 272, 80 S. Ct. 725, 736 (1960); *United States* v. *Ventresca*, 380 U.S. 102, 106, 85 S. Ct. 741, 744 (1965). The constitutional requirement of probable cause can be satisfied by hearsay information if (1) the application sets forth any of the underlying circumstances necessary to enable the magistrate independently to judge the informant's conclusion, and (2) the affiant-officers support their claim that their informant was reliable. *Spinelli* v. *United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 587 (1969).

The affidavit in the case at bar contained sufficient detailed and specific information to enable a magistrate to reach an evaluation of probable cause. The information in the affidavit came from, and was attributed to, a named non-professional informant. The usual requirement of prior reliability which must be met when police act upon "tips" from professional informers does not apply to information supplied by ordinary citizens. *People* v. *Hester*, 39 Ill. 2d 489, 514 (1968); *People* v. *Frisco*, ——Ill. App. 3d—— (No. 54822, February 24, 1972). Joel Saiken was not an unknown or unnamed informant, nor was he a professional informant. He was an identified citizen.

Corroboration was supplied by the detailed information given in the affidavit. That specificity included the fact that the object sought was "a dead human body; to wit: female approximately seventeen (17) years of age." Rather than speculation as to "some" body, the recitation identified both the age and sex of the body. Furthermore, the location of the buried body graphically provided: "buried beneath the ground behind the goose house . . . originally buried under on near a manure pile located behind or near the goose house . . . said manure pile subsequent thereto having been removed." These facts show that the identified informer was familiar with the site, knew the appearance of the site at the time of the burial, and knew that the site now appears differently. The detailed description of both the object to be found and the area to be searched provide corroboration. See *Draper* v. *United States*, 358 U.S. 307, 79 S. Ct. 329 (1959).

Since the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit (*Spinelli* v. *United States*, 393 U.S. 413, 415, 89 S. Ct. 584, 588); he could reasonably conclude that the informant was able to relate such specific information and observed the burial because the informer knew the appearance of the site when the body was "originally buried."

Similarly, the affidavit names the informer as Joel Saiken. It also identifies the owners of the property to be searched as Samuel and Minnie Saiken. Since the names of the informer and owners are identical, the informer is presented as a person who would have reason to know of the burial. At the same time, the legal description of the property amounts to independent corrobation by the police, for the owners and description of the property correspond to the information given by Joel Saiken.

Moreover, Indiana law (Burns Indiana Statutes, 9-607) provides for a judge to attend searches for a dead body. This uniquely provides a further measure of corrobation and reliability in that the issuing magistrate actually views the property and observes the search. The judicial figure here did go to the Saiken farm and did observe the digging commence. If he had been dissatisfied with the information provided he could have ordered a halt, then and there, to any further excavation. A judicial mind passed upon the existence of probable cause. *McCray* v. *Illinois*, 386 U.S. 300, 307, 87 S. Ct. 1056, 1060 (1967).

In the present case the magistrate was informed of *some* of the underlying circumstances supporting the conclusion. *Aguilar* v. *Texas*, 378 U.S. 108, 115, 84 S. Ct. 1509 (1964). Further corroboration in the instant case can be characterized as unavailable. That limitation results from the peculiar circumstances arising from searches of this nature. The situation here is distinct from on-going criminal activity such as narcotic sales or gambling operations. The police can independently observe street-corner sales, note the frequenting of a location by known addicts or gamblers, or manage to overhear telephone bets.

Here we have a dead human body that has been buried for some fifteen months. One possible method of corroboration would be an attempt to locate the "victim". However, the victim was a transient, variously residing in Michigan, Chicago, Indiana, Denver, and Las Vegas, and was known by two different names. A missing person check would consume considerable time with questionable results. And as each day passed, the continuing decomposition of the body rendered the assemblage of scientific evidence of the crime more remote.

The affidavit was sufficient to permit an independent, common-sense conclusion by a magistrate that a dead human body was probably present on the Saiken farm. *Jones* v. *United States*, 362 U.S. 257, 270, 80 S. Ct. 725, 736 (1960). Preference is always accorded police action taken under a warrant. *United States* v. *Ventresca*, 380 U.S. 102, 107, 85 S. Ct. 741, 745 (1965).

Assuming, arguendo, that the affidavit for a court order was not sufficient to support the issuance of that order, the police still had independent probable cause to conduct a search for the body of the deceased. Even if the court order was invalid, the search was nevertheless proper since defects in a search warrant are immaterial if the seizure can be otherwise justified. This doctrine has been recognized by both the Supreme Court of the United States (*Harris* v. *United States*, 390 U.S. 234) and the Illinois Supreme Court (*People* v. *Brinn*, 32 Ill. 2d 232; *People* v. *Wright*, 41 Ill. 2d 170). At this point it is appropriate to add other information known to the officers before they commenced their search. Primarily, that involved a declaration against interest made by Joel Saiken. This informer admitted that he knew where the body could be found because he had, in fact, buried it. Therefore, given the fact that Joel Saiken was an accomplice, the reliability of the information was established by his statement against his own interest. *People* v. *DeBerry*, 62 Ill. App. 2d 324 (1965). "Admission of crime, like admissions against proprietary interests, carry their own indicia of reliability — sufficient at least to support finding of probable cause to search." *United States* v. *Harris*, 403 U.S. 573, 91 S. Ct. 2075, 2081 (1971).

Finally, the search and seizure now complained of cannot be considered unreasonable and does not come within the ambit of the constitutional provisions against unrea-

sonable searches and seizures. As was stated by Mr. Justice Holmes in the case of *Hester* v. *United States*, 265 U.S. 57 (1924), "The special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers and effects", is not intended to open fields."

The location of the search was in excess of one thousand feet from the farmhouse and two hundred feet from a trailer, which was the closest thing to the unused goose house behind which the body was found. There was nothing beyond the goose house in terms of physical structures, only open fields. No building was searched at all. Consequently, the place searched was not within the curtilage. *Care* v. *United States*, 231 F. 2d 22, 25 (10th Cir. 1956), cert. denied, 351 U.S. 932; *McDowell* v. *United States*, 383 F. 2d 599, 603 (8th Cir. 1967).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

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